IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 11, 2005 Session

BEVERLY J. ROUSE v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission
No. 20200875 Vance W. Cheek, Jr., Commissioner

No. E2004-02142-COA-R3-CV - FILED SEPTEMBER 13, 2005

Beverly Jane Rouse ("the Claimant") suffered serious injuries when she tripped and fell on the uneven floor of a roofed, open-air picnic area at Brushy Mountain State Prison. The Claims Commission ("the Commission") dismissed the Claimant's action against the State of Tennessee, holding that the uneven floor was not a dangerous condition as that concept is found in Tenn. Code Ann. § 9-8-307(a)(1)(C) (Supp. 2004). The Claimant appeals. We vacate the Commission's judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Vacated; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Jason E. Legg, Knoxville, Tennessee, for the appellant, Beverly Jane Rouse.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Pamela S. Lorch, Senior Counsel, for the appellee, State of Tennessee.

OPINION

I.

On June 24, 2001, the Claimant, in the company of her daughter and the two children of the Claimant's son, traveled to Petros to visit her son, an inmate at Brushy Mountain State Prison. The visit was to take place at an outdoor picnic area, which was a part of the minimum security portion of the prison. The outdoor area consisted of picnic tables on the grounds as well as some tables on a tile/concrete floor sheltered by a roof. The four sides of the roofed area were open.

When the Claimant arrived at the picnic area, she entered the covered picnic pavilion; at the time, it was crowded with visitors. One man offered the Claimant – who uses a cane – the use of

the picnic table at which he was sitting. As the Claimant was in the process of responding to the man's offer, she suddenly tripped, fell, and struck her head on the floor of the picnic shed. She tripped at a place where the surface of the floor was uneven. She sustained multiple injuries, including a broken hip. At the time of the hearing below, the Claimant was 72 years old.

On March 6, 2002, the Claimant filed her claim against the State, alleging that her fall was caused by "an irregularity or hazard on the surface of the shed's floor, of which [the Claimant] was unaware, which made [the Claimant] insecure in her footing," and that the State had reason to know of the danger presented by the irregularity or hazard. At a bench trial, the Claims Commissioner ("the Commissioner") received testimony from, among others, the Claimant and several employees at the prison. At the conclusion of the hearing, the Commissioner held that the surface in question did not constitute a "dangerous condition[]." Accordingly, he dismissed the claim filed by the Claimant. From this judgment, the Claimant appeals.

II.

A direct appeal from the Claims Commission is governed by Tenn. Code Ann. § 9-8-403(a)(1) (Supp. 2004), which provides that a claimant may appeal the decision of an individual commissioner to the Court of Appeals pursuant to the Rules of Appellate Procedure. Since this is a non-jury case, our *de novo* review with respect to factual issues is undertaken with a presumption of correctness as to the Commissioner's findings of fact, a presumption we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Learue v. State***, 757 S.W.2d 3, 6 (Tenn. Ct. App. 1987). Our *de novo* review of questions of law is not burdened with a presumption of correctness as to the Commissioner's rulings on legal issues. ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993).

III.

The Claimant, by way of her sole issue on appeal, contends that the Commissioner erred in his determination that the uneven surface of the floor of the picnic area did not present a foreseeable risk of injury under all of the circumstances. The State argues that the Commissioner was correct in his finding. In addition, the State raises two issues. It argues that the Commissioner erred in permitting the Claimant to testify regarding a conversation she had immediately following her fall. The State also contends that the Claimant improperly made a reference in her brief to subsequently-taken remedial measures. The State's issues present questions of law.

IV.

A.

The Claimant's claim falls under the rubric of Tenn. Code Ann. § 9-8-307, which provides, in pertinent part, as follows:

> (a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:
>
> * * *
>
> (C) Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subdivision (a)(1)(C) must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures.

The statute further provides that "[t]he determination of the state's liability in tort shall be based on the traditional tort concepts of duty and the reasonably prudent person's standard of care." Tenn. Code Ann. § 9-8-307(c).

This statute essentially codifies the common law, which imposes upon an owner or occupier of land an obligation to exercise reasonable care and diligence in maintaining its premises in a safe condition. ***Sanders v. State***, 783 S.W.2d 948, 951 (Tenn. Ct. App. 1989). Since the statute codifies the common law obligation, any discussion of the statutory concept of "negligently created or maintained dangerous conditions," the mandate of "reasonable care," and the principle of "foreseeability of risk" necessarily focuses on traditional principles of negligence: (1) whether a duty of care is owed to a claimant; (2) whether the facts reflect conduct falling below the applicable standard of care, resulting in a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) legal causation. ***Hames v. State***, 808 S.W.2d 41, 44 (Tenn. 1991). Whether a condition is defective, unsafe or dangerous is a question of fact. ***Cornell v. State***, 118 S.W.3d 374, 378 (Tenn. Ct. App. 2003).

The first element – duty of care – is the legal obligation that one party owes to another to conform to a reasonable person standard of care so as to protect against unreasonable risks of harm. ***Dobson v. State***, 23 S.W.3d 324, 330 (Tenn. Ct. App. 1999). In other words, an owner or occupier of land has a duty "to maintain [its] premises in a reasonably safe and suitable condition." ***Eaton v. McLain***, 891 S.W.2d 587, 593 (Tenn. 1994).

In ***Eaton***, the plaintiff was spending the night with her daughter and son-in-law. ***Id***. at 588. She awoke about 5:00 a.m., "needing to go to the bathroom." ***Id***. at 589. The Supreme Court's opinion recites what happened next:

> Although it was very dark when she awoke, Ms. Eaton did not turn on either the light in . . . [the] bedroom [in which she had been sleeping] or the light in the hallway as she attempted to make her way

> to the bathroom. Instead, she proceeded across the hall and opened the basement door, believing it to be the bathroom door, and stepped inside. Ms. Eaton fell down the stairs and sustained injuries to her elbow and back.

Id. The plaintiff sued her hosts. She alleged that they were negligent "in turning the hallway and bathroom lights off, in failing to provide a working lock on the basement door, and in failing to warn her of the location of the stairs." ***Id***.

The Supreme Court in ***Eaton*** held that the defendants' general duty of care did not include a duty to guard against the acts alleged in the complaint. ***Id***. at 594-95. In so holding, the Court stated that it was not reasonably foreseeable that the plaintiff would fail to turn on any lights or that she would open a door and "step into an unfamiliar area." ***Id***. at 594. With respect to the plaintiff's allegation that the defendants were negligent in failing to warn her of the location of the steps, the Court stated that the defendants' general duty of care did not include a duty to warn regarding the steps because stairs descending from a hallway to a basement are a common feature of many homes. ***Id***. at 595.

In ***Dobson***, we discussed the concept of duty in the context of a case against the State seeking a money judgment based upon a theory of premises liability:

> In cases involving premises liability, the premises owner has a duty to exercise reasonable care under the circumstances to prevent injury to persons lawfully on the premises. This duty is based upon the assumption that the owner has superior knowledge of any perilous condition that may exist on the property. The duty includes the obligation of the owner to maintain the premises in a reasonably safe condition and to remove or warn against latent or hidden dangerous conditions on the premises of which the owner is aware or should be aware through the exercise of reasonable diligence. The duty of a premises owner is "a duty of reasonable care under all circumstances." The scope of this duty is grounded upon the foreseeability of the risk involved. Thus, in order to prevail in a premises liability action, the plaintiff must show that the injury was a reasonably foreseeable probability and that some action within the defendant's power more probably than not would have prevented the injury.

Dobson, 23 S.W.3d at 330-31 (internal citations omitted).

In ***Eaton***, the Supreme Court addressed the concept of foreseeability:

> Ordinary, or reasonable, care is to be estimated by the risk entailed through probable dangers attending the particular situation and is to be commensurate with the risk of injury. [citation omitted]. The risk involved is that which is foreseeable; a risk is foreseeable if a reasonable person could foresee the probability of its occurrence or if the person was on notice that the likelihood of danger to the party to whom is owed a duty is probable. Foreseeability is the test of negligence. If the injury which occurred could not have been reasonably foreseen, the duty of care does not arise, and even though the act of the defendant in fact caused the injury, there is no negligence and no liability. "The plaintiff must show that the injury was a reasonably foreseeable probability, not just a remote possibility, and that some action within the [defendant's] power more probably than not would have prevented the injury." [citation omitted].
>
> * * *
>
> The pertinent question is whether there was any showing from which it can be said that the defendants reasonably knew or should have known of the probability of an occurrence such as the one which caused the plaintiff's injuries.

Eaton, 891 S.W.2d at 594 (quoting ***Doe v. Linder Constr. Co.***, 845 S.W.2d 173, 178 (Tenn. 1992) (citations in ***Doe*** omitted in ***Eaton***)). The determination of whether one owes a duty to another rests upon "all the relevant circumstances, including the foreseeability of harm to the plaintiff and other similarly situated persons." ***Dobson***, 23 S.W.3d at 330.

In the instant case, the Commissioner's analysis went no further than the issue of whether the uneven surface of the floor of the picnic area constituted a dangerous condition. He held that it did not. Accordingly, our focus is on the question of whether the surface of the floor of the picnic area at the point where the Claimant fell was a "dangerous condition[]" within the meaning of the statute. Specifically, we must decide whether the evidence preponderates against the Commissioner's factual finding that the subject surface was not a "dangerous condition[]."

B.

In his opinion rendered from the bench, the Commissioner, relying on the principle that "[t]he duty of a premises owner is 'a duty of reasonable care under all circumstances,' " ***Dobson***, 23 S.W.3d at 330-31, held that the State acted with reasonable care under the circumstances. He further stated as follows:

> I just cannot see that the step is a dangerous condition. The standard I have to use is whether or not a reasonable person would consider

> that condition to cause them, that would cause a reasonable person to believe that the condition could cause them injury. . . . As I've looked at [the] exhibits, as I've listened to the testimony, I just don't think that it meets the . . . standard of a dangerous condition.

The Commissioner further noted that there were no prior reports of incidents causing injury, and that the rise in the floor was, at most, one and one-half inches in height.

The picnic area was created in 1977 or 1978 when a building at the site was razed. While the structure itself was completely removed, the floor of the razed building was left intact. The prison authorities added new surface to the existing surface by pouring concrete on the adjacent ground. When this portion of the modification project was done, the surface of the new outdoor picnic area consisted of the old tile/concrete floor and the new abutting concrete surface. The total area of the new enlarged surface was 15 feet wide and 40 feet long. A roof was erected over the surface and a wall of a few feet was built on at least one side[1] to complete the open-air, outdoor picnic shed.

The newly poured concrete surface did not join the old flooring so as to form a level, even juncture. As reflected in the photographs attached as an appendix to this opinion, the newly poured surface was approximately level until it reached a point a few inches from the edge of the old surface. From that point, the new surface was rounded up to join the old surface. The rise – or, put another way, the rounding up – measured approximately one to one and one-half inches in height, as shown in one of the attached photographs. The uneven joint was approximately 10 to 12 feet long. Part of this joint was concealed by picnic tables that straddled the uneven joint.

Visitors accessed the picnic area by traversing a walkway leading from the reception area to an indoor visiting area. From there, visitors could go outside to the picnic area. The covered area contains several picnic tables. Adjacent to the tables, and still under the roof, is an open area for walking to and from the tables. It was on this walkway that the Claimant fell.

C.

The crux of the issue before us is whether the State – in the person of the prison officials – "reasonably knew or should have known of the probability of an occurrence such as the one which caused [the Claimant's] injuries." ***Doe***, 845 S.W.2d at 178. We hold that this inquiry must be answered in the affirmative.

The covered picnic shed was designed and designated by the State as a place where visitors and inmates could meet, eat, and socialize. The evidence reflects that visitors regularly used the shed in the way contemplated by the State. The picnic area was crowded on the day of the Claimant's visit; the State had to have known that there would be visiting days when many visitors and inmates

[1] This wall is shown in one of the attached photographs.

would be present in the picnic area. It was also reasonable for the State to assume that the visitor "universe" would include persons of all ages – from the very young to the very old. The State could also reasonably anticipate that the visitors would include the healthy as well as the somewhat infirm. The visitors would be there to visit with loved ones and would likely be preoccupied with thoughts and emotions. There are several environmental factors that the State should have reasonably anticipated. Natural lighting in the shed is limited by people in the shed, and, on some occasions, weather conditions such as rain or clouds. Shadows could be expected from the roof, the picnic tables, and the angle of the sun. The floor appears to consist of many colors. The joinder of the two floors is not clearly identified. When all of these factors are considered, we conclude that the probability of a fall and resulting injuries could have been, and should have been, anticipated by the State.

D.

Based upon the description of the area as testified to at trial and the photographs introduced as exhibits, we hold that there was a "reasonably foreseeable probability," ***Doe***, 845 S.W.2d at 178, that a person would trip over the rise created by the uneven floor. The inside-the-picnic-shed walkway that the plaintiff was traversing at the time of her fall appears to be the way by which visitors accessed the various tables. This rise occurred in the middle of the walkway, and it is undisputed that there were no signs or paint alerting a visitor to the fact that there was a potential hazard created by the uneven floor.

It is true, as the Commissioner noted, that there was no evidence showing reports of accidents at the subject site. We also recognize that Vaughn Armes, the building maintenance supervisor at the prison, testified that both his monthly inspections and the inspection conducted by the American Correctional Association every three years revealed no problems. However, we do not find this to be dispositive of the question of whether a dangerous condition was created by the floor of the picnic area in view of the larger principle before us, *i.e.*, whether a "reasonable person could foresee the probability of [the] occurrence [of the risk of injury]." ***Id.*** We find that this uneven surface presented a foreseeable risk to a person, regardless of age or physical condition.

In reaching our conclusion, we note the testimony of prison officers who were aware of the condition. Officer Ron Taylor testified that he was careful when walking through that area because he knew about the uneven surface; however, he also opined that it was not something that you would necessarily look at and identify as a danger. Officer Lon Saunders, on the other hand, testified in his deposition that he "ha[d] walked through there and caught [his] toe on [the rise area] . . . but [he] knew it was there so it wasn't that big of a deal to [him]." We point out Saunders' testimony to demonstrate that a fall was a reasonably foreseeable probability as evidenced by the fact that even a person *familiar* with these environs had caught his toe at the site of the uneven surface.

As we stated in a case brought against a municipality under the Governmental Tort Liability Act,

> [a]ll the cases recognize that the question of whether the defect is actionable is to be determined not alone from its height or depth, but from all the circumstances. The test is the degree of danger, or possibility of injury, from the defect. Of course, anything that in fact causes harm is to some degree dangerous; but to impose liability, the thing must be dangerous according to common experience.

Henry v. City of Nashville, 318 S.W.2d 567, 568 (Tenn. Ct. App. 1958). Accordingly, despite the fact that the "rounding-up" was only approximately one to one and one-half inches in height, and that no prior incidents causing injury had been reported, we find that, considering all of the circumstances, this condition was "dangerous according to common experience." ***Id.***

In summary, the underlying assumption of the duty in a premises liability case – "that the owner has superior knowledge of any perilous condition that may exist on the property," ***Dobson***, 23 S.W.3d at 330 – is certainly true with respect to the uneven surface in this case. When one considers what the State knew and what it should have known about (1) the uneven surface of the floor of the picnic area, (2) how the picnic area was utilized, by whom and under what circumstances, and (3) the environmental factors impacting one's ability to discern the uneven surface, it is clear to us that the State "reasonably knew or should have known of the probability of an occurrence such as the one which caused [the Claimant's] injuries." ***Doe***, 845 S.W.2d at 178. Accordingly, we conclude that the evidence preponderates against the Commissioner's factual determination that the uneven surface did not constitute a "dangerous condition[]."[2]

V.

In its brief, the State raises two questions of law: (1) that the Commissioner erred in permitting the Claimant to give certain hearsay testimony, and (2) that the Claimant wrongfully alluded to subsequently-taken remedial measures in her brief.

As to the first issue, the State argues that the Commissioner erred in admitting a statement allegedly made to the Claimant shortly after her fall, *i.e.*, "I've told them to get this fixed because somebody's going to get hurt bad on it." She initially identified the speaker as Officer Ron Taylor; however, she later acknowledged that she was not certain it was he. The State objected to the admission of this testimony on the ground that Officer Taylor was a "low level employee" and, consequently, was "not a representative of the [S]tate." The Commissioner, in overruling the State's objection, stated that "[t]his Commission has held, consistently held, that representatives of the State, particularly in the correctional facility in that area, are deemed to be of such a level that it would qualify as an admission." On appeal, the State continues to pursue its "low level employee"

[2] While notice is not an issue on this appeal, we assume the uneven joinder of the two surfaces was created by the State. *Cf.* ***Sanders v. State***, 783 S.W.2d 948, 952 (Tenn. Ct. App. 1989) ("In the case at bar, the state constructed the offending instrumentality and obviously must be charged with notice of its condition as constructed.").

argument, but cites no authority for its contention aside from a very general reference to Tenn. R. Evid. 803, the rule dealing with exceptions to the hearsay rule.

In reading Rule 803, we do not find a "low level employee" exception stated as such. The State may well have been trying to argue that Officer Taylor did not fit within Rule 803(1.2)(D) so as to make his statement admissible as an admission by a party-opponent; but this is not what its counsel said in making and pursuing the objection. We decline to place the Commissioner in error based upon such a general, imprecisely-worded objection. However, we hasten to add that, even if we were to find that the Commissioner erred in admitting Officer Taylor's statement to the Claimant, the admission of this testimony would not be such as to prompt us to change our holding in this case.

Rule 803(1.2)(D) contains a number of elements that must be present to warrant the introduction into evidence of a statement by an "agent or servant" as an admission against the principal. Should this matter come up again on remand and a proper objection is made, the Commissioner can then determine whether the subject statement is admissible as an admission by the State. *See* Neil P. Cohen, Sarah Y. Sheppeard & Donald F. Paine, ***Tennessee Law of Evidence*** § 8.06[6] (4th ed. 2000).

Second, the State asks us to disregard the reference in the Claimant's brief to remedial measures undertaken by the State after her fall. At trial, the State asked the court to strike testimony in Officer Armes' deposition pertaining to these remedial measures; Claimant's counsel, quite correctly, did not object to this testimony being excluded. Suffice it to say, we have not considered, in any way and for any purpose, alleged remedial measures that occurred post-accident.

VI.

The judgment of the Claims Commission is hereby vacated. This case is remanded for further proceedings consistent with this opinion. Costs on appeal are taxed to the appellee, the State of Tennessee.

_____

CHARLES D. SUSANO, JR., JUDGE